

IN THE SUPREME COURT OF IOWA  
Supreme Court No. 15–1543

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STATE OF IOWA,  
Plaintiff-Appellee,

vs.

CARLOS ARIEL GOMEZ GARCIA,  
Defendant-Appellant.

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APPEAL FROM THE IOWA DISTRICT COURT  
FOR MUSCATINE COUNTY  
THE HONORABLE STUART P. WERLING, JUDGE

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**APPELLEE’S BRIEF**

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## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

### **I. On This Record, Can the Defendant Prove Prejudice Based on the Absence of a Reported Oral Colloquy Surrounding His Waiver of His Right to a Jury Trial?**

#### Authorities

*Strickland v. Washington*, 466 U.S. 668 (1984)  
*Commonwealth v. Mallory*, 941 A.2d 686 (Pa. 2008)  
*State v. Artzer*, 609 N.W.2d 526 (Iowa 2000)  
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*State v. Stallings*, 658 N.W.2d 106 (Iowa 2003)  
*State v. Wills*, 696 N.W.2d 20 (Iowa 2005)  
Iowa R. Crim. P. 2.17(1)

### **II. Did the Trial Court Abuse Its Discretion by Providing a Standby Interpreter for the Defendant?**

#### Authorities

*Lamasters v. State*, 821 N.W.2d 856 (Iowa 2012)  
*Meier v. Senecaut*, 641 N.W.2d 532 (Iowa 2002)  
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*State v. Matheson*, 684 N.W.2d 243 (Iowa 2004)  
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## **ROUTING STATEMENT**

The issues raised here can be resolved through the application of settled legal principles. Accordingly, this case should be transferred to the Iowa Court of Appeals. *See* Iowa R. App. P. 6.1101(3)(a).

## **STATEMENT OF THE CASE**

### **Nature of the Case:**

Carlos Ariel Gomez Garcia was charged with delivery of a controlled substance, a Class C felony, in violation of Iowa Code section 124.401(1)(c)(2)(b) (2015). A Spanish interpreter had been provided for him during earlier court proceedings. Just before his jury trial was set to begin, he told the trial court that he was fluent in English and did not need an interpreter. The trial court was skeptical. It instructed interpreters to continue providing real-time translation, but told the defendant that he could remove the wireless earpiece if he no longer desired to use the Spanish translation services. The defendant argued that this would be obtrusive, and would prejudice the jury against him. The trial court disagreed. Subsequently, the defendant waived his right to a jury trial in an unreported colloquy. *See* Trial Tr. p.3,ln.1–p.19,ln.12. The case proceeded to a bench trial, and the defendant was found guilty as charged.

On appeal, the defendant argues that defense counsel was ineffective for allowing him to waive his right to a jury trial without a record demonstrating compliance with Rule 2.17(1) and challenges the trial court's ruling that standby interpreters should continue to provide translation services.

**Course of Proceedings:**

The State generally accepts the defendant's description of the course of proceedings. *See* Iowa R. App. P. 6.903(3).

**Facts:**

The underlying facts of the offense are irrelevant to the challenge on appeal. Relevant facts will be discussed throughout the argument.

## ARGUMENT

### I. **The Defendant's Ineffective-Assistance Claim Must Be Preserved for Post-Conviction Relief Because He Cannot Demonstrate Prejudice on This Record.**

#### **Preservation of Error**

Ineffective assistance of counsel can represent “an exception to the general rules of error preservation” when failure to preserve error is part of the basis for the claim. *State v. Stallings*, 658 N.W.2d 106, 108 (Iowa 2003), *overruled on other grounds by State v. Feregrino*, 756 N.W.2d 700 (Iowa 2008).

#### **Standard of Review**

Claims of ineffective assistance of counsel are reviewed *de novo* because they present constitutional issues. *See State v. Liddell*, 672 N.W.2d 805, 809 (Iowa 2003) (citing *Stallings*, 658 N.W.2d at 108).

#### **Merits**

To establish ineffective assistance of counsel, “a defendant must typically show that (1) counsel failed to perform an essential duty and (2) prejudice resulted.” *State v. Keller*, 760 N.W.2d 451, 452 (Iowa 2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). If the defendant fails to prove either breach or prejudice, “his ineffective assistance of counsel claim must fail.” *Liddell*, 672 N.W.2d at 809 (citing *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997)).



The State agrees that defense counsel's failure to comply with Rule 2.17(1) and confirm that the defendant's waiver was "knowing, voluntary, and intelligent" was a breach of an essential duty. *See, e.g., State v. Keller*, 760 N.W.2d 451, 452 (Iowa 2009) (citing *Stallings*, 658 N.W.2d at 112). Because there is no written waiver and no record of any oral colloquy explaining the jury trial right, the State will not attempt to demonstrate compliance with Rule 2.17(1).

However, the defendant cannot prove prejudice on this record. "Under our ineffective-assistance-of-counsel rubric, in order to establish the prejudice prong, [he] must prove by a preponderance of the evidence that, but for counsel's failure to assure compliance with the rule, [he] would not have waived her right to a jury trial." *Keller*, 760 N.W.2d at 453; *see also Feregrino*, 756 N.W.2d at 707–08.

The defendant argues that prejudice should be presumed. *See* Defendant's Br. at 9–10. But the Iowa Supreme Court has refused to presume prejudice in these situations because "[t]he absence of an oral colloquy or a written waiver does not necessarily prove that a defendant failed to understand the nature of the right waived by proceeding to a non-jury trial." *See Feregrino*, 756 N.W.2d at 708 (citing *Commonwealth v. Mallory*, 941 A.2d 686, 697 (Pa. 2008)).

The defendant's only argument for presuming prejudice is that "waiver of a jury has constitutional implications." See Defendant's Br. at 9. But *Feregrino* found this argument unpersuasive.

[W]hether there has been such an alteration of the fundamental trial framework in violation of the defendant's right to a jury trial depends on the resolution of an antecedent question, namely, whether, notwithstanding the violation of the rule, the defendant knowingly and voluntarily waived his right to a jury trial. The antecedent question of whether a defendant knowingly or voluntarily waived a jury trial presents a question of historical fact. . . . Resolution of the waiver issue is no more difficult than countless other factual questions that are resolved by our courts every day. If as a matter of fact the waiver was knowingly and voluntarily given, no infringement of a constitutional right or structural defect is present.

*Feregrino*, 756 N.W.2d at 708; see also *Keller*, 760 N.W.2d at 453.

Iowa appellate courts may address ineffective-assistance claims on direct appeal "when the record is sufficient to permit a ruling." *State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005) (citing *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000)). But this record contains nothing that would enable this Court to determine whether the defendant suffered prejudice as a result of his trial counsel's failure to ensure compliance with Rule 2.17(1). As such, this claim does not provide a route to reversal—instead, the defendant's conviction should be affirmed and this claim should be preserved for postconviction relief.

## **II. The Trial Court Did Not Abuse Its Discretion When It Provided Standby Interpreters for the Defendant.**

### **Preservation of Error**

The defendant objected to the interpreters' presence at trial, and challenged the trial court's ruling on the matter. *See* Trial Tr. p.3,ln.5–p.17,ln.18. Error was preserved by the trial court's ruling, which "indicate[d] that the court *considered* the issue and necessarily ruled on it." *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012) (citing *Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002)).

### **Standard of Review**

The defendant classifies this as an evidentiary ruling, and states that it is reviewed for abuse of discretion. *See* Defendant's Br. at 10. The State would distinguish this from an evidentiary ruling; however, abuse of discretion is still the proper standard for reviewing the court's determination that it had "a reasonable basis to believe a person has limited English proficiency." *See* Iowa Ct. R. 47.3(1).

### **Merits**

"Every person who cannot speak or understand the English language and who is a party to any legal proceeding . . . shall be entitled to an interpreter to assist such person throughout the proceeding." Iowa Code § 622A.2 (2015); *see also* Iowa Ct. R. 47.3(1).

The court’s stated reasoning demonstrates that it was primarily concerned with its duty “to make sure that [the defendant’s] right to fair trial is protected.” *See* Trial Tr. p.15,ln.5–10. Essentially, this is a risk-averse approach, which seeks to avoid the possibility of making an erroneous decision *not* to retain interpreters by erring on the side of caution. Caselaw and commentary discussing translation services generally treats this as the correct approach. *See, e.g.*, B. John Burns, 4A Iowa Practice Series § 15.1 (2016) (“[D]efense counsel is well-advised to err on the side of procuring the services of a qualified interpreter, if for no other reason than to be available to clarify terms the defendant does not understand.”); *State v. Inich*, 173 P. 230, 234 (Mont. 1918) (“[I]t is often the case that a person who understands and speaks with reasonable ease the language of the street, or of ordinary business, encounters difficulty and embarrassment when subjected to examination as a witness during proceedings in court.”). Moreover, that prudent approach made sense in light of the court’s stated discomfort with the idea of dismissing interpreters without some formalized “English competency test” with legal significance, and its entirely accurate observation that no such test exists. *See* Trial Tr. p.16,ln.19–p.17,ln.2. Therefore, there was no abuse of discretion.

The defendant has cited no authority that would establish that the court abused its discretion by adopting a risk-averse approach to translation services. The State cannot find any published Iowa case dealing with a challenge to a decision to provide translation services over the defendant's insistence that such services were unnecessary. But persuasive authority from Minnesota suggests that the defendant must provide "support from the record to demonstrate that he was prejudiced or confused" by the method in which allegedly unneeded translation services were provided. *See State v. Boutouli*, No. A10–1666, 2012 WL 34022, at \*3 (Minn. Ct. App. Jan. 9, 2012). Indeed, the defendant agrees that "prejudice must be shown" before this claim will warrant reversal. *See* Defendant's Br. at 10 (citing *State v. Jordan*, 779 N.W.2d 751, 756 (Iowa 2010)).

However, he has failed to show prejudice. Indeed, his only argument on prejudice is that the court's decision to ask interpreters to continue providing standby translation services "ultimately prejudiced [him] by placing [him] in a position of waiving his right to trial by jury." *See* Defendant's Br. at 14. The State cannot see why the defendant would fear that any juror would be biased against him based on the fact that he was receiving standby translation services.

The defendant does not specify how those translation services might have prejudiced any juror against him, nor does he cite any caselaw that could establish that point on his behalf. *See* Defendant's Br. at 11–14; *see also* Iowa R. App. P. 6.903(2)(g)(3) (“Failure to cite authority in support of an issue may be deemed waiver of that issue.”). And the defendant offers no reason to believe that providing a limiting instruction regarding the interpreters' presence would have been insufficient to mitigate whatever prejudice may have resulted. *See* Trial Tr. p.12,ln.9–14; Trial Tr. p.14,ln.25–p.15,ln.10. As such, the defendant's argument is facially deficient because he does not attempt to demonstrate how the claimed error produced any prejudicial effect. As a result, even if the trial court abused its discretion by providing standby translation services, the defendant still would not be able to show any error that requires reversal or justifies granting relief.

Additionally, even if the defendant had made some colorable argument that provision of standby translation services would have compromised a *jury's* ability to weigh evidence fairly, that argument would be irrelevant because this case was tried before the court. “[L]egal training assists the fact finder in a bench trial ‘to remain unaffected by matters that should not influence the determination.’”

*State v. Bonilla*, No. 05–0596, 2006 WL 3313783, at \*4 (Iowa Ct. App. Nov. 16, 2006) (quoting *State v. Matheson*, 684 N.W.2d 243, 244 (Iowa 2004)); see also *State v. Casady*, 491 N.W.2d 782, 786 (Iowa 1992) (noting the potential for prejudice resulting from improper use of other-crimes evidence “is reduced in the context of a bench trial”); *State v. Smith*, No. 08–0876, 2010 WL 4867379, at \*5 (Iowa Ct. App. Nov. 24, 2010) (“While a seemingly inflammatory remark made in front of a jury could give rise to a presumption of prejudice, a bench trial is unique, as courts are acutely aware of defendant’s right to a fair trial, and how it is essential for trial courts to be impartial in the treatment of defendant, counsel, and witnesses.”). There is no indication that the fairness of this bench trial was compromised or that its outcome was influenced by the court’s ruling on this issue or by the presence of standby interpreters. *Cf.* *State v. Kostic*, No. 02–1752, 2004 WL 2238632, at \*2 (Iowa Oct. 6, 2004) (holding that any deficient performance on the part of an interpreter was not prejudicial because “[e]ven had the interpreter done an exemplary job of interpreting, we cannot say there is a reasonable probability the result would have been different”). Therefore, any error was harmless, and the defendant’s claim fails.

## **CONCLUSION**

The State respectfully requests that this Court affirm the defendant's conviction.

## **REQUEST FOR NONORAL SUBMISSION**

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:
  - This brief contains **2,034** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1)
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  - This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Georgia font, size 14.

Dated: July 11, 2016



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